No. 06-1641

IN THE

Supreme Court of the United States

JUAN C. ESPINOSA, *et ux.*,

Petitioners,

v.

UNION COUNTY, NEW JERSEY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR UNION COUNTY RESPONDENTS

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QUESTION PRESENTED

1. Whether the District Court's decision dismissing Petitioners' complaint should be affirmed where the court found as a matter of law that the Petitioner was not terminated for engaging in protected activity but rather because he refused to return to work after being ordered to do so?

2. Whether Petitioner is barred from pursuing his legal claims because he abandoned his position after he failed to return to work?

3. Whether a public employer has a duty to provide alternative employment for an employee who, as part of his obligations as a law enforcement officer, testifies against fellow correction officers and who then, unlike other similarly situated testifying officers, refuses to return to work?

4. Whether the District Court erred in finding that Petitioner had received due process of law where the undisputed material facts of record showed no connection between Petitioner's alleged protected conduct and his termination; that Petitioner was the only testifying officer to refuse to return to work; that, in spite of Petitioner's refusal to return to work he demanded to receive full pay and benefits for an indefinite period of time; that Petitioner was receiving full pay and benefits from the County while refusing to report to work; that there was no legally enforceable agreement to provide Petitioner with alternate employment; and that the County acted within its rights in terminating Petitioner's employment under these circumstances?

PARTIES TO THE PROCEEDING

JUAN C. ESPINOSA; MAUREEN ROIG-EXPINOSA, PETITIONERS

COUNTY OF UNION; STATE OF NEW JERSEY; POLICEMEN'S BENEVOLENT ASSOCIATION UNION COUNTY CORRECTIONS OFFICERS LOCAL #199, INC.; JOHN DOES 1-25 (fictitious names intending to designate currently unknown entities and persons, individually and in their official capacities.); COUNTY OF UNION BOARD OF CHOSEN FREEHOLDERS; UNION COUNTY PROSECUTOR'S OFFICE; JAMES J. DURKIN, individually and in his official capacity; THEODORE J. ROMANKOW, UNION COUNTY PROSECUTOR in his official capacity and his predecessors and successors also known as THEODORE J. ROMANKOW; THOMAS K. ISENHOUR, individually and in his official capacity; DIRECTOR JAMES E. COLEMAN; JAMES F. DOUGHERTY, JR.; HAROLD GIBSON; MICHAEL J. LAPOLLA County of Union and County of Union Board of Chosen Freeholders, RESPONDENTS

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RELEVENT PROVISIONS INVOLVED

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment XIV

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . ."

N.J.S.A. § 34:19-3:

"forbids employers from retaliating against an employee who . . . [p]rovides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law by the employer . . .;"

N.J.A.C. § 4A:2-6.2(b):

"[a]ny employee who is absent from duty for five or more consecutive business days without the approval of his or her superior shall be considered to have abandoned his or her position and shall be recorded as a resignation not in good standing."

STATEMENT OF THE CASE

In June 1995, Union County Correction Officer, Petitioner Juan Espinosa, witnessed fellow correction officers severely beat and torture INS detainees at the Union County Jail in Elizabeth, New Jersey. Although a superior officer at the time, Espinosa did not intercede on behalf of

those being beaten nor did he report the criminal activities of his fellow correction officers to any supervisor or the Union County Prosecutor's Office. Upon investigating the crime, the Union County Prosecutor's Office discovered that Espinosa had witnessed the beatings and reached out to him for assistance.

In exchange for his testimony against numerous correction officers in grand jury and trial proceedings, as well as wearing a recording device inside the jail, the Prosecutor's Office agreed to not prosecute Espinosa in connection with the beatings. In addition, the Prosecutor's Office arranged to have the County continue to pay Espinosa's salary and benefits until the conclusion of the officers' trials. The Prosecutor's Office further agreed to provide recommendations and references to assist Espinosa to secure future employment, and also agreed to pay Espinosa up to $15,000 for relocation expenses. The Prosecutor's Office memorialized the promises to Espinosa in a letter. Thus, "Espinosa knew in 1995 that the County intended to take him off the payroll after the conclusion of the trials because he was no longer performing any services for the County." (App. 14a)

During the investigation and prosecution of fellow correction officers, Espinosa was permitted to leave his post at the jail due to the volatile work environment caused by his participation with the Prosecutor's Office. Despite Espinosa's obligations with the Prosecutor's Office ending in May 1998, when all trials and sentencing related to the incident were complete, he continued to receive salary and benefits from the County. During this time, however, "Espinosa did not have permission to be absent and he failed to perform any services for the County justifying compensation . . .." (App. 19a) Unlike Espinosa, other testifying officers continued to work in the Jail and returned to their posts following the completion of trials and

sentencing. In August 2000, the Division of Corrections requested Espinosa either to return to duty or resign. Espinosa knew he "wasn't going to be home getting paid forever" (App. 21a), yet he refused to return to work, resign, or abandon his post. Espinosa's decision placed the County in the unfeasible position of continuing to pay Espinosa for an undetermined period of time despite his no longer working for the County. Consistent with applicable Civil Service rules, the County preferred disciplinary charges against Espinosa for abandoning his post and, following a departmental hearing, duly terminated his employment.

REASONS FOR DENYING THE PETITION

1. The Third Circuit Properly Followed This Court's Jurisprudence When Evaluating The Petitioner's First Amendment Claims And, In Addition, Public Policy Does Not Justify Granting The Petition.

The Petitioner may not rest on mere allegations that the County penalized him for his protected speech, but rather must set forth "significant probative evidence tending to support the complaint." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986) (if the evidence is merely colorable or not significantly probative summary judgment is appropriate); *see also Crawford-El v. Britton*, 523 U.S. 574, 592 (1998) (existing law already prevents the more narrow element of unconstitutional motive from automatically carrying a plaintiff to trial). Petitioner was permitted to temporarily leave his post at the jail during his participation with the investigation and prosecution of fellow jail guards involved in the INS detainee beatings. Although the Petitioner alleges he was penalized for his protected speech and only recalled to duty so he could be

fired, "the proposition carries the soundness of logic along with its defect: its separation from context," the same criticism made by the Petitioner of the Court of Appeal's opinion. The Petitioner admittedly knew that he was going to be taken off the payroll after the conclusion of the trials and, importantly, testified at his deposition that he would *not* have been terminated had he returned to the jail and started working on August 14, 2000. (App. 14a) The Petitioner's own words about his absence and ability to return to work contradict his current argument that the only factor behind his termination was his testimony.

The Court of Appeals' determination that the Petitioner failed to establish a causal connection between his testimony and later termination, corresponds with this Court's jurisprudence relating to § 1983 retaliatory action claims. *See Hartman v. Moore*, 126 S.Ct. 1695, 1703 (2006) (plaintiff has the initial burden to plead and prove adverse official action in retaliation for making statements); *Crawford-El*, 523 U.S. at 598 ("[T]he court may insist that the plaintiff 'put forward specific, nonconclusory factual allegations' that establish improper motive causing cognizable injury . . . ."). This Court in *Hartman* went on to hold that action colored by some degree of bad motive, proof of some retaliatory animus in an official's mind, does not amount to a constitutional tort if the action would have been taken anyways. *Hartman*, 126 S.Ct. at 1704.

The Court of Appeals did not contravene this Court's jurisprudence when it recognized that the Petitioner failed to establish a colorable connection between his expressive conduct and his termination. Indeed, it was Espinosa's affirmative action of not returning to work, and not his choice to testify, which was the basis for his removal. As the Court of Appeals recognized, had the County desired to fire Espinosa based on his testimony, he would have been fired regardless of whether or not he returned to work.

However, Espinosa's own words contradict such a motivation by the County.

Even when the general rule has been clearly established (the first amendment bars retaliation for protected speech) the substantive legal doctrines on which the plaintiff relies may facilitate summary judgment. *Crawford-El*, 523 U.S. at 592-93 (finding that doubt as to the illegality of the defendant's conduct and insufficient connection between the alleged animus and particular injury may support the granting of summary judgment). The Court of Appeals did not "subvert the very purpose of § 1983" when denying the Petitioner's claims, but rather the Petitioner's unsuccessful attempts to establish a tenuous connection between his termination and a constitutionally protected interest were at the heart of his failed claims.

The Petitioner next posits that the Court of Appeals' decision only will enforce the code of silence amongst law enforcement and prevent persons, like the Petitioner, from testifying truthfully. However, in this misguided belief, the Petitioner is contradicted by the plain fact that "all other officers that testified during the trial, one of which also wore a wire inside the jail to assist in the investigation, returned to work immediately after testifying." (App. 32a) Certainly, there is a strong public policy in favor of witnesses coming forward and testifying truthfully during trial proceedings; however, there is no indication that the County's actions in dismissing the Petitioner when he refused to return to work while expecting to be paid, somehow leaves future witnesses with an "impossible choice." Indeed, it was Petitioner who imposed upon the County an "impossible choice" of continuing to provide the Petitioner full pay and benefits despite the Petitioner not performing any service for the County and also being gainfully employed by a different employer during the same time period. Neither public policy nor this Court's

jurisprudence relating to § 1983 claims justify the granting of certiorari.

2. The Lower Court's Granting of Summary Judgment Was Appropriate Under the Circumstances And Did Not Violate The Petitioner's Seventh Amendment Right To A Jury Trial.

Due process is not a technical conception with a fixed content that may be separated from time, place and circumstances. *Gilbert v. Homar*, 520 U.S. 924, 930-31 (1997) (emphasizing the flexibility of the concept as contrasted with any type of sweeping and categorical rule defining due process). "Due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

In line with this Court's conception of due process, the summary judgment procedure is regarded as an integral part of the Federal Rules, which is intended to secure a just, prompt and inexpensive determination of every action. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). It should *not* be regarded as a disfavored procedural shortcut. *Id.* Unlike the concept of summary judgment forwarded by the Petitioner, this Court has held that the burden on the moving party is to point out to the lower court that there is an absence of evidence to support the nonmoving party's case. *Id.* at 325 (moving party does not bear the burden to produce evidence showing the absence of a genuine issue of material fact). "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Liberty Lobby, Inc.*, 477 U.S. at 247-48.

Despite the Petitioner's argument to the contrary, the Court of Appeals did "draw all justifiable inferences in

the non-movant's favor" and still determined that such information would not have precluded summary judgment. The lower court considered the potential evidence the Petitioner sought to produce and the reasonable inferences manifested, but ultimately concluded that such evidence was cumulative and that the District Court acted well within its discretion. *See Old Chief v. United States*, 519 U.S. 172, 180, 183 (1997) (finding that determinations as to cumulativeness and relevance of potential evidence is within the province of the trial judge and reviewing courts must evaluate the lower court's decision from that perspective and not indulge in review by hindsight). The Court of Appeals decision falls squarely in line with this Court's jurisprudence and did not intrude into an area better left to the province of the jury.

The Court of Appeals did not overreach when affirming summary judgment against the Petitioner. The Court of Appeals' determination that the Petitioner had a weak constitutional interest in terms of his employment with the County is consistent with this Court's jurisprudence. In *Gilbert*, this Court established that when determining what process is constitutionally due, a court must balance the interests of the parties, the procedures used, and the probative value of additional/substitute procedural safeguards. 520 U.S. at 931-32. This Court went on in *Gilbert* to determine that the state has a significant interest in maintaining public trust and confidence in employees such as police officers, and that when an individual's services are no longer useful to the government, the Constitution does not require the state to bear the burden of hiring a replacement while still paying the person. *Id.* at 932.

As the Court of Appeals recognized, the County had a strong interest in removing a nonworking employee from the payroll, as compared to the Petitioner's interest in being

kept on the County payroll in addition to receiving pay and benefits as a full time employee for a different employer. The Court of Appeals' balancing approach to the Petitioner's due process claims closely mirrors this Court's jurisprudence advanced in *Gilbert*.

The Court of Appeals' decision did not undermine the Petitioner's right to a jury trial under the Seventh Amendment nor did it violate due process protections. The lower court acted well within the jurisprudence established by this Court when determining that the Petitioner's claims failed as a matter of law.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that the Supreme Court deny the petition for certiorari.

Respectfully submitted,
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